Service Date: May 21, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

IN THE MATTER of the Application of a)	UTILITY DIVISION
Skyland Technologies, Inc.,)	
Pursuant to 47 U.S.C. Section 252(e) of the)	DOCKET NO. D98.1.2
Telecommunications Act of 1996 for)	
Approval of its Interconnection Agreement)	ORDER NO. 6048a
with U S WEST Communications, Inc.)	

FINAL ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the 1996 Act) was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications market. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251(c) and 252(a).

U S WEST and Skyland Technologies, Inc. (Skyland) negotiated an interconnection contract after Skyland requested contract negotiations. The agreement is entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Skyland Technologies, Inc. for Montana" (Agreement). U S WEST submitted the interconnection agreement to the Montana Public Service Commission (Commission) for approval on April 3, 1998. The parties' Agreement was reached through voluntary negotiations and requires Commission approval prior to

implementation pursuant to 47 U.S.C. § 252(e). The Commission must approve or reject the Agreement no later than July 2, 1998--90 days following the request for approval--or it will be deemed approved. 47 U.S.C. § 252(e)(4).

On April 14, 1998, the Commission issued a Notice of Application and Notice of Opportunity to Intervene and Comment. The notice established April 24, 1998 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in Section 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by April 24, 1998. The Notice further stated that comments were required to be filed no later than May 8, 1998.

The Notice published by the Commission in this proceeding advised interested parties in the geographic areas affected by the Agreement that intervention in the proceeding was limited and that the Montana Consumer Counsel (MCC) could be contacted to represent consumer interests. The MCC neither requested intervention nor filed comments. The Commission received no comments.

Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

The Interconnection Agreement between U S WEST and Skyland provides for, *inter alia*: interconnection by means of collocation, entrance facilities, or meet point arrangements; the exchange of traffic between U S WEST and Skyland; compensation for transport and termination of such traffic; the use of interim and permanent Number Portability; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from

U S WEST; Skyland customer access to operator assistance, Directory Assistance and E911 service; access to poles, conduits and rights-of-way; access to operational support systems and myriad other arrangements necessary for Skyland's provision of competitive local exchange services.

- The Commission must approve or reject the parties' agreement, with written findings as to any deficiencies, no later than July 2, 1998. 47 U.S.C. §§ 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:
 - (2) GROUNDS FOR REJECTION The State commission may only reject--
 - (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(A)] if it finds that:
 - (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
 - (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.
- Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.
- 4 Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). Significantly, standards set forth

in § 251(c) and which this agreement may have been negotiated "without regard to" include the following:

- (c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. --In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
 - (2) INTERCONNECTION.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
 - (A) for the transmission and routing of telephone exchange service and exchange access;
 - (B) at any technically feasible point within the carriers' network;
 - (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and
 - (D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c). This section and § 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission. By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

- No comments have been received that express any reservations about the parties' Agreement not complying with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened or filed comments that indicate that he believes that the Agreement is not consistent with the pubic interest, convenience and necessity. No other telecommunications carrier has filed comments to indicate that the Agreement is discriminatory toward a carrier not a party to the Agreement.
- The Agreement contains some provisions which defer determination of specific issues, such as the pricing and standards of performance for services acquired from U S WEST.

 The existence of these provisions should not prevent Commission approval of the Agreement simply because not all the details are set forth.
- When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in §252 of the 1996 Act--to determine if it discriminates against a carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The Commission can reject portions of the agreement, but it cannot require additional provisions.
- However, states may "impose, on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

 47 U.S.C. § 253(b). Prior Commission orders approving interconnection agreements have emphasized the importance of meeting the public interest requirement and in fact have rejected

contract terms which fail to consider such. For example, the Commission rejected a term in several resale agreements which appeared to infringe on customer privacy and freedom of choice by permitting U S WEST to unilaterally determine that an account was "in arrears" and to refuse to transfer the customer to another carrier. See, e.g., In the Matter of the Application of Citizens Telecommunications Company for Approval of its Resale Agreement With U S WEST Communications, Inc., Docket No. D96.11.191, Order No. 5962a (Feb. 10, 1997). In another docket, the Commission rejected a section which provided for a creditworthiness database because it would permit credit information to be reported to a credit reporting agency without the customer's authorization. See In the Matter of the Application of Sprint Communications Company L.P. for Approval of its Interconnection Agreement with U S WEST, Docket No. D97.8.160, Order No. 6030 (Nov. 25, 1997). In numerous dockets, the Commission has rejected contract terms that do not provide for notification to the Commission if a reseller is subject to being terminated, do not provide for Commission notification if disputes arising from the contract are to be determined by an arbitrator that is not the Commission, and do not consider that U S WEST may have obligations to construct facilities that can legally be imposed upon it. The Commission has repeatedly rejected provisions that are not in the public interest.

- 9 The Commission has rejected these and other contract terms in numerous agreements filed for its approval pursuant to § 252 of the Act because they are not consistent with the public interest, convenience and necessity. This agreement contains terms which are similar to those which we consistently have rejected for that reason.
- The Commission finds that the parties' Agreement appears to conform to the standards required by the 1996 Act, except as provided below.

The Commission rejects the following provisions:

- Dispute Resolution Section 26.17 beginning on page 109 sets forth the parties' agreement pertaining to resolution of disputes arising under the Agreement. It provides that such disputes may be brought to the Commission or may be referred to arbitration under rules of the American Arbitration Association (AAA) and that procedures prescribed by the AAA rules shall apply. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to include relevant language.
- The Commission has repeatedly rejected dispute resolution contract terms which do not provide for appropriate notification to the Commission when a matter is referred to an arbitrator that is not the Commission. The Commission will continue to do so, as should be noted by U S WEST and other parties to interconnection agreements.
- Remedy for Non-Payment of Undisputed Billed Amounts Section 11.8.7 sets forth in detail the remedy for non-payment to U S WEST by Skyland. It provides that if Skyland fails to make payments of undisputed amounts on dates and times specified, U S WEST may, 30 days after providing written notice to Skyland, refuse additional applications for service and/or refuse to complete any pending orders for Skyland service at any time thereafter. It further provides that if U S WEST does not discontinue services on the date specified in the

notice and noncompliance continues, "nothing contained herein shall preclude U S WEST's . . . right to discontinue the provision of the services to Skyland without further notice." Pursuant to the terms of this section, if Skyland does not make payment to U S WEST, Skyland's end user customers' services could be in jeopardy of being disconnected through no fault on their part.

- This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users—as must Skyland. If notified of a pending termination of service to Skyland's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Skyland's end users with no notification to the Commission. The Commission rejects Section 11.8.7 of the parties' Agreement. The parties may amend this section of the Agreement to include a provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.
- This section is identical to Section 31.8.7 in the Sprint/U S WEST interconnection agreement which was also rejected. *See* Docket No. D97.8.160, Order No. 6030 (Nov. 25, 1997). In addition to Section 11.8.7, we reject related Section 11.4.6, which provides that if U S WEST terminates provisioning of any resold services to Skyland for any reason, Skyland is responsible for providing notice to its end users of the termination and U S WEST will not be responsible for providing such notice. Clearly, it is in the public interest as discussed above that U S WEST, at the very least, provide advance notice to the Commission when it is considering terminating service to a reseller.
 - 16 <u>Construction</u> Section 11.5.7 of the Agreement (pp. 174-75) states:

Resold services are available where facilities currently exist or are provided in the future as part of U S WEST's normal course of business operations for its end users and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Skyland requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to Skyland a price quote for the construction. If the quote is accepted, Skyland will be billed the quoted price and construction will commence after receipt of payment.

Once more, this is an identical provision previously rejected by the Commission in the Sprint/ U S WEST agreement in Docket No. D97.8.160, Order No. 6030. The Commission finds that this provision could conflict with the public interest and should be rejected because there may be circumstances which arise where U S WEST, pursuant to its duties as a carrier of last resort, is required by law to construct facilities. The parties may amend this section to address this concern. The agreed upon terms may apply for instances where U S WEST has no carrier of last resort responsibilities.

- Customer Authorization: Section 11.3.11. on page 73 applies to the unauthorized switching of providers (slamming). It provides that the procedures may be superseded or modified by FCC rules or industry standards and requires Skyland to produce a record consistent with FCC rules in the event of a slamming dispute. The Commission rejects this entire section because it does not include and does not comply with Montana law and Commission rules on slamming. The parties may amend these sections to include Montana law and Commission rules.
- This is the same provision--word for word--that the Commission rejected in the Sprint/ U S WEST agreement in Order No. 6030, Docket No. D97.8.160 on February 24, 1998.

Further, similar provisions have been rejected in numerous other dockets. Despite the continued rejection of this and similar terms as being contrary to Montana law, U S WEST persists in including this term in its interconnection agreements.

- In Section 11.3.11.2.1, also under Customer Authorization, Skyland agreed to provide any end user information and billing records it has obtained--relating to the end user--to the previous reseller. Presumably, the previous reseller has such records already, but there may be instances where the information has changed. In such cases, it is not appropriate that the previous reseller have the information unless the end user has given permission. Therefore, we reject this section as well as Section 11.3.11.1.
- Regulatory Approval: Section 26.30 on page 112 provides that the Agreement "will be filed with the Commission and may thereafter be filed with the FCC and shall, at all times, be subject to review by the Commission or the FCC." To the extent the parties intend that the FCC approve or reject the agreement, this section is inconsistent with the 1996 Act. While the FCC may preempt state law, it has no other role that this section may contemplate. We reject this section, as we have done before with identical sections. The Commission rejection of this section has no real effect on the Agreement and there is no need to amend the section. The FCC may preempt state law, but it may only do so according to correct procedures. Further, the parties have ongoing obligations to negotiate in good faith to arrive at mutually acceptable modifications and amendments.

The Commission addresses the following discussion to Section 7.4 of the contract and any related provisions:

- 21 <u>Common Collocation</u>: In addition to the provisions for physical and virtual collocation which are included in this and other contracts between U S WEST and competitive local exchange carriers, this Agreement includes a section entitled "Common Collocation." This is the first interconnection contract to include common collocation, which U S WEST agrees to provide by means of a Single Point of Termination (SPOT) bay. We note that the Definitions section has not been updated to include common collocation along with physical and virtual collocation.
- The parties are free to provide for access to unbundled network elements in any manner that meets the requirements of § 251 of the Act. They may not, however, discriminate against other telecommunications carriers who are not parties to an agreement. 47 U.S.C. § 252(e)(2)(A).

III. Conclusions of Law

- The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. Skyland intends to provide regulated interexchange telecommunications services in the State of Montana, and will also be regulated when it begins offering local exchange service in Montana as a competitive local exchange carrier.
- The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it.

 Section 69-3-103, MCA.

- The Commission has jurisdiction to approve the Interconnection Agreement negotiated by the parties and submitted to the Commission for approval according to Section 252(e)(2)(A). Section 69-3-103, MCA.
- The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending* scattered sections of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.
- 5 Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.
- Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the U S WEST/Skyland Agreement by July 2, 1997, or the Agreement will be deemed approved.

IV. Order

THEREFORE, based upon the foregoing, it is ORDERED that the interconnection

Agreement between U S WEST Communications, Inc. and Skyland Communications Company,

L.P., is approved as discussed herein, subject to the following conditions:

- 1 Without undue delay, the parties may file an amendment to the Agreement consistent with the Commission's decision in this proceeding.
- The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 18th day of May, 1998, by a vote of 5-0.

NOTE:

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

	Dave Fisher, Chairman
	Nancy McCaffree, Vice Chair
	Bob Anderson, Commissioner
	Danny Oberg, Commissioner
	Bob Rowe, Commissioner
Attest:	
Kathleen M. Anderson Commission Secretary	
(SEAL)	

Any interested party may request the commission to reconsider this decision. A

motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.